STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Neff, P.J., and Cooper and R.S. Gribbs, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

Supreme Court
No. 127897

MAURICE LAMONT NYX,

Defendant-Appellee.

Court of Appeals No. 248094
Lower Court No. 02-007289-01

The People's Brief on Appeal
on Leave Granted
Oral Argument Requested

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Statement of Jurisdiction

This Court granted the People's Application for Leave to Appeal by Order of March 31, 2006.

Statement of Question Presented

The "subset of the elements" test supplies the rule for determining when an offense is a degree of the charged offense where the Legislature has not itself formally divided the offense into degrees. The Legislature has created the offense of criminal sexual conduct, and has divided it into four degrees: first-degree criminal sexual conduct, second-degree criminal sexual conduct, third-degree criminal sexual conduct, and fourth-degree criminal sexual conduct. Could the trial judge, sitting as the trier of fact, thus consider, and convict Defendant, charged with first-degree criminal sexual conduct, of second-degree criminal sexual conduct?

The People answer yes.
Defendant answers no.
The Court of Appeals answered no.

Statement of Facts

Defendant, Maurice Lamont Nyx, was charged in an Information in the Third Judicial Circuit with three counts of first-degree criminal sexual conduct, pertaining to complainant Ebony Wilson, in violation of MCL 750.520b(1)(b)(iii). Specifically, the Information alleged that Defendant had engaged in sexual penetration with Ebony Wilson, who was 15 years old at the time, and so was a person at least 13 but less than 16 years of age, and that Defendant was in a position of authority over the complainant and used this authority to coerce the victim to submit. The Information alleged that three sexual penetrations had occurred, one being vaginal penetration and two being penetration with the finger or fingers. The matter was tried in a waiver (bench) trial with the Honorable Vera Massey Jones sitting as the trier of fact.

Testimony and Evidence

Prosecution Witnesses

Ebony Wilson

Ebony Wilson testified that she was 15 years old, that her birth date was December 12, 1986 (People's Appendix, 18a). She testified that she was currently in 10th grade at Davis Aerospace Technical High School (19a). The previous year, when she was in ninth grade, she had attended the Detroit School of Industrial Arts (19a).

After she started attending the Detroit School of Industrial Arts, she met Defendant, who was a counselor there (20a). Her first meeting with him was when she went to RC ("Resolution Center"), where students were sent when they were late for class or were kicked out of class for some reason (21a). The lunchroom was where RC was held (21a). When she went to the RC,

Defendant was the monitor there, meaning that he sat at a table and watched everybody in the room, to make sure that nobody talked or walked around (21a). Defendant was the only adult in the room (22a).

March 19, a Tuesday, was the date that she was sent to the RC during her sixth hour, which was the last hour of the day (22a). Her reason for going down to RC was that she had a stye on her eye and she asked her teacher if she could go there (22a). The sunlight in the class room was very bright and it was making her eye, which was already irritated by the stye, real watery (23a). Defendant was the monitor that day (24a). When she got down to RC, she sat at a table with her friend Shadonna Stubbs and the two of them started doing their work (24a). She had not gone down to RC simply to socialize with Shadonna (24a). While she was sitting at the table with Shadonna, she asked Defendant if she could go to the bathroom because her eye was bothering her (25a). Defendant told her that he would go get her an ice pack (25a). Defendant left and came back with an ice pack wrapped in a big black garbage bag (25a-26a). She put that on her face for a second and then she asked Defendant if she could go to the bathroom and get some paper towels to wrap around the ice (26a). Defendant said that she could do that and that's what she did (26a-27a). The bathroom was one floor up, right above the lunch room, so she had to go up a flight of stairs to get to it (27a). When she came out of the bathroom, Defendant was standing in the hallway, across from the bathroom that she had just come out of (27a). Defendant told her to go to his office, which was another flight of steps up (27a). Defendant did not say why he wanted her to got to his office, but she did what Defendant told her to do (28a). When she got to Defendant's office, Defendant was not there (28a). She sat down for a minute in Defendant's office, and then, Defendant came in and told her to go stand by the double doors at the end of the hallway (28a-29a).

When she got to the double doors, which were three or four doors down from Defendant's office, she turned around and did not see Defendant (30a). She stood by the double doors and then she heard a knock on the double doors from the other side; it was Defendant (30a). Defendant opened the double doors and said, "Come here" (30a-31a). She went through the double doors and followed Defendant down two flights of stairs to an area that was not part of the school (31a); she thought that where she and Defendant now were was part of the church (32a). She and Defendant were right by the lunchroom but on the other side of a set of double doors; she could not see the lunchroom, from where they were (32a). This set of double doors was never used by the students (33a). There was no light where she was, but she was still able to see Defendant's face (33a).

Defendant stood in front of her and looked at her (33a). He then put his hands around her waist and started kissing her on the lips and on the neck (33a-34a). She didn't say anything to him (34a). She was scared because Defendant was a grown man and he was over her, standing in front of her (34a). Defendant then slid her pants and her underpants down to just above her knees (34a-35a). It was easy for him to do this because she had a small waist (35a). Defendant then stuck his finger in her vagina (35a). He didn't stick his whole finger, just a little bit (36a). Then he rubbed his whole body up against hers (36a). He then unzipped his pants and pulled out his penis and stuck it in her vagina (37a). His penis was erect and he stuck the head of it in her vagina (37a). It hurt when he did that and she said, "Ouch" (38a). He told her that she was tight (38a). He then just stopped and pulled her pants and her underpants up and told her not to tell anybody; he said, "And tell your friend you were sick in the bathroom, and you didn't feel good" (38a). She had been gone for 15 or 20 minutes (39a). The friend he was referring to was Shadonna (39a).

She reiterated that she was afraid of Defendant, not only because he over her and standing in front of her, but because he worked for the school and he knew that she had skipped school a couple of weeks before, on March 5 (40a). He knew because he saw her and Shadonna down the street running back to school on that date (40a). When she and Shadonna got back to school, Defendant told them to come to him (40a). He asked them where they had been (41a). They lied to him and told him that they had been at a friend's house (41a). He said, "Well, I don't believe you, so we're going to talk" (41a). She and Shadonna and Defendant then went up to Defendant's office (41a). Defendant said to them, "If you tell me the truth, I can help. But if you don't, I can't" (41a). Defendant then separated them (41a). He talked to Shadonna first and she told him the truth (41a). Then she talked to her and she also told him the truth, the truth being that she skipped school and had sex with her ex-boyfriend (41a-42a). She was afraid that if she did not tell Defendant what she had done, her parents would find out that she had skipped school (44a). He asked her if she had used protection; she told him that she had, to which he replied, "Because if you didn't, I will beat your 'a' myself" (42a). Defendant then said, "Well, have a nice day, and come see me tomorrow morning, "and that was the end of the conversation (43a).

Gong back to the date of March 19, Ebony Wilson testified that Defendant told her to go back through the double doors on the second floor (44a). She went back up to the second floor and then went back to the lunchroom (44a-45a). Defendant came back a couple of minutes after that (46a). She sat back down next to Shadonna and Shadonna asked her why her hair was all messed up (45a). She told Shadonna that she had gotten sick in the bathroom (45a). The reason that her hair was all messed is because the back of her head had been up against the wall when she was with Defendant (45a). Shadonna didn't believe her, and so, she ended up telling Shadonna what had happened

(45a-46a). Twenty minutes later, the school bell rang signaling the end of the school day (46a). She and Shadonna walked out of school together and Shadonna walked to her mother's car and she walked to her own mother's car (46a). She did not tell her mother what had happened at school between her and Defendant (47a). She didn't tell because she thought that she would get into trouble for having skipped school (47a).

On the following day, Wednesday, March 20, she told a friend of hers, Dwayne Credit, what had happened to her the day before (48a).

Two days after the incident, on Thursday, March 21, she was down in the lunchroom on lunch duty with Shadonna (49a). This was their punishment for skipping school; Defendant was the one who assigned them to that duty (49a). Not only were she and Shadonna down there for lunchroom duty, there were also two other girls, Milisa Wesley and Tiffany Burton (50a-51a). The lunchroom duty was after lunch was over; they were assigned to clean up the lunchroom (50a). Defendant was also there, supervising them (51a).

At some point, she asked Defendant if she could go to the bathroom (51a). She went up to the bathroom above the lunchroom (52a). She used the bathroom, and when she came out, Defendant was out in the hallway, outside of the girls' bathroom (52a). Defendant just stood there and looked at her and said, "I want you to stand by those double doors at the end of the hallway on the second floor"(52a). She thought that the same thing that had happened two days before was going to happen again (52a). She felt obligated to do what Defendant told her to do because she did not want her parents finding out about her skipping school (52a-53a). She went upstairs to the double doors, as she had on the prior occasion (53a). Defendant did not follow her up there, but rather, he went a different way (53a-54a). When she got to the double doors, the doors opened

(53a-54a). She did not see Defendant until she walked through the double doors (53a-54a). When she saw Defendant, Defendant told her to follow him and she followed him down the stairs, the same stairs that she had walked down two days before (54a). He led her to the same area that they had gone to two days before, the area on the opposite side of the lunchroom with no light (55a). There was no one else down there (55a). When they got to this area, Defendant asked her if she had been running her mouth (55a). She told him that she had not, but he didn't believe her; he said, "Yes, you have" (53a). Defendant then just looked at her and started kissing her on the lips, neck, and face (55a). She did not do anything, but just stood there (56a). Then, Defendant slid her pants down and her underpants down along with them and rubbed in between her legs, inside her vagina (56a).

As they were standing there, the door started opening towards her and Defendant shoved it back shut (56a-57a). She did not see anybody on the other side of the door, but she did hear Shadonna laughing (57a). She did not say anything when the door opened because she was afraid; she thought that he would do something to her because he already thought that she had told somebody (57-58a). He again accused her of having told somebody and she told him that she had not (58a). He insisted that she had and then he said, "Come on, let's go" (58a). She went back to her classroom (58a). There were only five or six minutes left in that hour before she went to her sixth hour class (58a).

When she went home after school that day, she still did not tell her parents about what had happened (59a). This was, again, because she did not want them finding out about her having skipped school (60a). She had, however, told Shadonna, as she said, and she also ended up telling Milisa and Tiffany (60a).

Eventually, she did tell her parents (61a). She ended up telling them because another of her friends, Portia, called and told her (the witness's) mother about what had happened, and that was what caused her mother to ask her if it was true (61a-63a). She told her mother that it was (63a). This was on Friday night, the same week of the incidents (62a). When her father got home, she told him as well (63a). Her father took her to the Fifth Precinct to report it; this was around 12:00 or 1:00 a.m. (63a).

She reiterated that she had also told Dwayne Credit because he was a good friend of hers (64a). She was aware that Credit wrote some kind of blackmail letter as a result, which she had not wanted any part of and she told him this (64a-65a).

On cross-examination, Ebony Wilson testified that when she went to the Fifth Precinct with her father, she left there and went to 1300 Beaubien (Police Headquarters), where she gave a statement to an investigator (67a). The investigator asked her what had happened and then she (the investigator) wrote everything out (67a). She told the investigator that she had had penis-to-vaginal intercourse with Defendant on Tuesday, the 19th, and she also told the investigator about the 21st (68a-69a).

She acknowledged on cross that she had been getting into a lot of trouble at school and that her parents were told that if she got in trouble again she would be sent to a girls' home (71a).

She testified that her mother took her to Cottage Hospital the next morning, that is, the 22nd (72a-73a). She was asked if she gave the person who interviewed her in the emergency room an account of the incidents; she responded that she did (74a). She was asked if it were not true that she told this person that the incidents had occurred in Defendant's office (74a). She responded that

she did not tell the person that, although she did acknowledge that was what the report said; she stated that the report was incorrect (76a).

Also on cross, the witness was asked if at the Preliminary Examination, she was asked if Defendant had had an erection and if her answer was that he had not (77a). The witness acknowledged this, but explained that she had told the prosecutor at the exam that she got "erection" and "ejaculation" mixed up (77a). She reiterated that Defendant was standing directly in front of her (77a). She asked how tall she was; she responded that she was 5'4" or 5'5" (77a-78a). She was asked if it was her testimony that Defendant inserted his penis while they were both in a standing position; she responded that it was (78a).

She reiterated that it was March 5 when Defendant caught her skipping school (78a). Her mother had dropped her off at school that morning, but she left, never even going inside the school building (79a). It was when she and Shadonna were coming back to school at about 2:45 that Defendant caught them, and the reason he caught them was because a boy said something which caused Defendant to look at them (78a-79a). That was when Defendant took them to his office, where they stayed until 3:30, after which they went out to their parents' cars (79a); her mother usually picked her up at 2:45 (80a). She told her mother that she was 45 minutes later because Defendant needed to talk to them about something (80a).

She testified that it was Wednesday, the same week as the incidents, that she became aware that Dwayne was going to try and blackmail Defendant (81a). She found this out because Dwayne told her, but again, she wanted no part of it and she told him so (81a-82a). She acknowledged that she did not tell the police investigator about Dwayne's intention to blackmail Defendant; she explained that she did not tell the investigator this because she had had no part in it (82a).

Finally, the witness was asked on cross if Defendant had tried to have anal intercourse with her; she responded that he had (83a). She was asked if she told the police investigator this; she responded that she did (83a). She was asked if she also told the hospital personnel this; she responded that she did (83a).

On redirect examination, the witness testified that the hospital staff told her that she could not do a rape kit because she had taken a shower since the incidents (84a).

Also on redirect, the witness was asked when the attempt at anal intercourse occurred; she responded that it occurred on Tuesday, March 19 (85a). When asked how that came about, she responded that after Defendant stick his penis in her vagina, he stood behind her, while her pants were still down, and he tried to stick his penis in her butt (85a). He tried forcing it in, but it wouldn't go in and she said, "Ouch"(85a).

Further on redirect, the witness was asked how tall Defendant was; she responded that he was about 5'11" or 6' tall (86a). When asked how it was that Defendant was able to stick his penis in her vagina, she responded that Defendant bent down or leaned down (86a).

Susan Diehl

Susan Diehl testified that she was vice president of a company that had a contract with the Detroit School Board to manage staffing and operations at the Detroit School of Industrial Arts (People's Appendix, 87a). She herself was in charge of staffing (87a). She knew Defendant, who she identified in court (88a). Defendant had been Dean of Students at the Detroit School of Industrial Arts (89a). He had been promoted to that position and had been Dean for a year and a half to two years (89a). The Dean of Students was mostly responsible for student discipline, monitoring the building, and security (89a). He had the authority to handle minor offenses by

students not entailing offenses which would lead to suspension or expulsion (89a). A minor offense would be one, for instance, where a student may be uncooperative in class and would have to be sent to the Resolution Center (RC) (89a). In fact, one of Defendant's duties was being in charge of the Resolution Center (89a). The lunchroom in the basement was used as the Resolution Center (89a-90a). Except for the lunch hours, there could be students down there at all times of the day (90a).

She became aware of one of the students, Ebony Wilson, when her parents came to the school to inform the school principal that they had filed a report of sexual misconduct on the part of Defendant with the police (90a-91a). She was not at the school at the time, but when she was notified of this, she met with their attorney and the school director at the school (91a-92a). The first thing she did upon arriving at the school was to initiate an investigation (95a). This meant that she talked with a number of people, including some students: Shadonna, Milisa, Tiffany, a boy named Kevin, and another named Dwayne Credit (93a-95a). And she talked to Defendant (93a; 96a). She did not meet with Ebony Wilson, however, until the following week (94a). She also went to the place where Ebony had reported that the incidents had happened, which was at the back stairwell, where the school connected with the church (97a). To get to this area, one would have to go through the double doors from the RC to the hallway or one could get to the area from the stairwells on the first floor or the second floor that were connected to that stairwell (97a). This was, however, a stairwell that was not used by the school population because they had a lease with the church for the school building, but not for the church; they didn't want kids going into the church lobby (98a). When she used the double doors that went from the RC to get to the area of the alleged incident, she had to unlock the doors because they were chained (98a). What one had to do was unlock the lock and then undo the chain and then push the door open (99a). The doors were kept chained on a daily

basis (99a). She herself did not have a key for the lock (99a). Only a few people had keys; Defendant was one of these people (99a). The other way to get to the area of the alleged incident was by way of a stairwell from the first upper floor and stairwell from the second upper floor (100a). To get to each of these stairwells, one would have to go through a set of double doors to each (100a). Both of these sets of double doors were left unlocked by order of the Fire Marshall; both sets of double doors were, nevertheless, off-limits to students and the students knew this (100a-101a).

When she went to the area of the alleged incident, she found that it was very dark; there was no lighting (102a-103a). This was not because there was no light fixture; there was a light fixture, but the bulbs were burned out (103a). She knew that the light bulbs were just burned out, as opposed to the fixture not working, because the bulbs were replaced and the fixtures worked (104a).

On examination by the court, the witness reiterated that Defendant had authority to discipline minor offenses (105a). She was asked if skipping school was a minor offense; she responded that it was not (105a).

Shadonna Stubbs

Shadonna Stubbs testified that she was 15 years old and currently attended the Detroit School of Industrial Arts (People's Appendix, 106a). She had attended there the previous year as well and had been in ninth grade the previous year (106a). She knew Ebony Wilson (106a). Ebony was a friend of hers who she had known since eighth grade (106a). Ebony had also attended the Detroit School of Industrial Arts the pervious year (107a). And she knew Defendant, who she identified in court (107a). Defendant had worked as a behavior counsel at the school that she and Ebony had attended the previous year (107a-108a). She met Defendant a couple of days after school started the previous year (108a). She met him in the Resolution Center (RC) where students who were late

or misbehaved were sent (108a). The RC was downstairs in the lunchroom (109a). When she first saw Defendant, he was down there writing the names of the students who were there and monitoring the room (108a-109a).

On March 19 of the previous year, she was in the RC for being late (158). Ebony Wilson was also in the RC that day (109a-110a). The reason that Ebony was there, however, was because she had a stye on her eye (109a-110a). She went down to the RC at the beginning of sixth hour (111a). Defendant was down there on that day as well; he was the only adult supervisor that day (111a). When she got to the RC, which was at the beginning of sixth hour, Ebony was already there; she was trying to show Defendant the bump on her eye (112a). She heard Defendant tell Ebony that he would get an ice pack to put on her eye (112a). Defendant went someplace and got an ice pack and gave it to Ebony (112a). Ebony asked Defendant if she could get something to wrap the ice pack in because it was too cold on her eye (112a). She (the witness) put her head down for a minute or so at that point, and when she looked up, Defendant and Ebony were gone (113a). She saw Ebony about 45 minutes after the time that she had noticed that Ebony was no longer in the RC (114a). She noticed that Ebony's hair was "shuffled," meaning that it was out of place and sticking up, whereas it had been neat and laying down before (115a). She asked Ebony why her hair was messed up and Ebony told her that he had been in the bathroom (116a). She told Ebony that she did not believe her because if she had truly been in the bathroom, she would have seen that her hair was messed up (116a). She asked Ebony where she really had been and Ebony wrote an "F" on the desk (116a). What she understood this to mean is that Ebony had had sex with somebody (116a-117a). She asked Ebony, "With who? Mr. Nyx?," and and Ebony responded, "Yeah, but don't tell" (116a). The reason that she asked Ebony if it had been Mr. Nyx was because

he had also been gone when she was gone and he had been messing with her, meaning flirting with her, before (117a-118a). When asked what things she had seen Defendant doing that she considered flirting, she responded that she had seen Defendant going into Ebony's pockets and taking her food and making her come and get it (118a).

Later that night, she spoke to Ebony on the phone and had a conversation about what had happened (119a). She told her own mother, but her mother did not believe her (119a). She did not tell anybody else because Ebony had asked her not to tell anybody (119a).

She was in RC a couple of days later, during fifth or sixth hour (120a). She, Ebony, Milisa Wesley, and Dwayne Credit were all sitting together on the stage (121a). Defendant was also there in RC (121a). He was, again, the only adult supervisor (121a). It happened again that she put her head down for a minute, and, when she looked up, Ebony and Defendant were gone (122a). This happened ten or fifteen minutes into the hour (122a). Ebony had told her where she and Defendant had gone to the time before, and, when she started to get worried about Ebony, when Ebony had been gone for about 25 minutes (124a), she and Milisa and Dwayne went looking for Ebony and went to that spot (121a). The spot was a set of double doors in the lunchroom (125a). She was worried that Defendant was doing something else to Ebony (124a). This day, there were no chains on the door, as there usually were (126a), and she pushed it and something pushed back (123a). They got scared and went back to where they were sitting in RC and sat down (123a). She then thought that Ebony might be behind the doors, so she went back to them and pushed on them again (127a). This time, the doors opened and she saw a chair behind the doors (127a). She thought that it had been the chair that had pressed on the doors from the other side (127a). She had never been in the area

on the other side of the double doors because they weren't supposed to be over there; they had been told by the principal that it was private property (127a-128a).

On cross-examination, the witness testified that the reason she had gone down to RC on March 19 was because she had had a headache (129a-130a). When Ebony and Defendant were gone for 25 to 45 minutes on March 19, there was nobody monitoring the RC; that is, there was no adult supervision (131a). She reiterated that when she and Ebony were in RC on March 19, this was sixth hour (132a). She testified that she had attended her fifth hour class that day, Algebra 1, with Mr. Wardell (132a). After Mr. Wardell's class, she went to her sixth hour class, and her sixth hour teacher, Mr. Manteuffel, gave her permission to go to RC (132a-133a). When asked if Ebony went to Mr. Wardell's fifth hour Algebra class on March 19, the witness stated that if that was the day that she and Ebony had lunch duty, they would not have gone to Mr. Wardell's class because their lunch duty would have been during fifth hour (133a-134a). The witness then testified that it was March 21 that she and Ebony had had lunch duty, so that that would have been the day that they did not go to Mr. Wardell's fifth hour Algebra class (137a0138a). They got lunch duty for skipping school on March 5 (138a-139a). It was Defendant who caught them skipping school that day (140a). It was her testimony, then, that it was fifth hour on March 21, when she and Ebony were in the lunchroom on lunch duty (140a).

When she tried opening the doors on March 21, and the doors pushed back, she said, "Oh, my God" (141a). She did not say it with laughter in her voice (141a). She and the people who were with her then ran back to where they had been sitting (142a).

After the fifth hour was over, and Ebony hadn't come back to the lunch room, she went looking for Ebony (145a). She walked past her sixth hour classroom and saw her teacher, Mr.

Mantueffel, at his desk; he did not see her, however (143a-144a). She went back downstairs to the lunchroom and Defendant came back down there as well, and he told her to get to her classroom (144a-145a). She asked him where Ebony was and he told her that she was in class (145a). She told him that she wasn't because she had just walked by the classroom and she wasn't in there (145a). He told her again to go to her sixth hour class and she ended up going, although she was about five minutes late (145a). Ebony was already in class, just as Defendant had said (146a).

Valerie Wilson

Valerie Wilson testified that Ebony Wilson was her 15-year-old daughter (People's Appendix, 147a). Her daughter currently attended Davis Aerospace Technical High School and was in tenth grade (147a). The previous year she had been in ninth grade and had attended the Detroit School of Industrial Arts (148a). Her daughter no longer went to that school because of what had happened the previous year, in the latter part of March (148a-149a). She became aware of something having happened on the following Saturday (149a). After her daughter told her about it, her husband took their daughter to the police station; this would have been around midnight on early Sunday morning (149a-150a). On the following Monday, she and her husband went to the school and talked to the principal (151a).

On cross-examination, the witness acknowledged that she had told her daughter at one point that if she got in trouble again, she would be sent to a girls' home (152a). This was based on her behavior at the school she had attended previously to the Detroit School of Industrial Arts (152a). She was not aware of any behavioral problems at Detroit School of Industrial Arts (152a).

Detroit Police Investigator Audrey Thomas

Detroit Police Investigator Audrey Thomas testified that she was assigned to the Sex Crime Unit, Squad One, which was called the Kiddie Squad (People's Appendix, 153a). On March 25, a Monday, she was assigned to investigate this case (154a). What she had to go on initially were the complainant's statement and the police report (154a). Her first move was going to be to contact the school to set up a meeting with the school principal, but she was contacted by the school before she got the chance to contact them (155a). She went to the school a couple of days later where she met with a Mrs. Diehl, from whom she took a statement (156a). Mrs. Diehl showed her where the incidents were supposed to have occurred (156a). After Mrs. Diehl showed her this area, she contacted an evidence technician to take photographs of the area (156a). On the day that she spoke to Mrs. Diehl and the school principal, Mrs. Diehl gave her a note which was written on a red piece of paper and addressed to Mr. Nyx at the Detroit School of Industrial Arts (159a-160a). A day or two after she spoke to Mrs. Nyx, she contacted Defendant by phone (163a-164a). Defendant had not yet been charged with anything regarding this case (163a). Sometime later, on April 21, Defendant came in to her office with an attorney (164a-166a). At that point, she referred Defendant to another officer, Sergeant Alma Hughes-Grubb (167a).

On cross-examination, Investigator Thomas testified that the warrant request was submitted to the Prosecutor's Office on April 23 (171a). She was asked if it had come to her attention that Defendant, at some point, had made a statement; she responded that it had, on April 21 or 22 (172a). She was asked if there was any information in her request for the warrant, that being the Investigator's Report, that the complainant had said that there had been had anal intercourse; she responded in the negative (173a). When asked if there was any information that the complainant

had alleged that Defendant had inserted his finger in the complainant's vagina on March 21, Investigator Thomas responded that there was not (173a). Finally, Investigator Thomas acknowledged that in her Investigator's Report, she had typed, "Admissions: Defendant made no statement." (174a).

On redirect, Investigator Thomas testified that even though she was made aware that Defendant had made a statement, she still wrote "no statement" in her Investigator's Report (175a). It was Sgt. Grubb who informed her that Defendant had made a statement (175a). Also on redirect, Investigator Thomas reiterated that in the complainant's statement there was no indication of Defendant putting his finger in her vagina on March 21 (176a). After being shown the complainant's statement, she acknowledged that in the statement, the complainant had said, "Yes, on Thursday, he did put his finger in my vagina," and that she had incorrect when she said on cross that there had been no indication of the complainant having said that (178a).

Detroit Police Sergeant Alma Hughes-Grubbs

Detroit Police Sergeant Alma Hughes-Grubbs testified that on April 21, 2002, she came into contact with Defendant; she came into contact with Defendant through Investigator Audrey Thomas (People's Appendix, 180a). Prior to speaking to Defendant, she went over the various police reports and the statements of the witnesses with Investigator Thomas (182a). The documents concerned an incident that had occurred at the Detroit School of Industrial Arts involving a student there (182a). Before advising Defendant of his constitutional rights, she learned from Defendant that he had attended four years of college (183a). She then advised Defendant of his constitutional rights, using a standard Advice of Rights form; Defendant initialed all of the rights on the from and signed the form and did not indicate that he wanted to remain silent or that he wanted an attorney

(183a-186a). Defendant initially denied that anything sexual had occurred (186a). She continued to talk to Defendant and then Defendant did admit going to the downstairs area with Ebony Wilson (187a). He told her that Ebony had been following him for the past two weeks, which had bothered him, that, when he went to the downstairs area with her, she pulled her pants partially down and grabbed his penis and tried to put it inside of her vagina, and that he put both of his arms around Ebony and his hand then went between her legs and touched her vagina (187a-189a). He told her that somebody came to the door and he pushed the door back with his arm, and that he never saw who was on the other side of the door (189a). Defendant was crying when he told her all of this and told her that he would lose his job (189a).

After Defendant told her all of this, she asked him to write it down (191a). He told her that he could not spell very well, but he did start writing and she left the room (191a). When she came back in the room, Defendant had balled up the piece of paper that he was writing on and had thrown it in the trash (191a).

On cross-examination, Sgt. Hughes-Grubbs testified that she spoke to Investigator Thomas after she talked to Defendant (194a). She was asked if she told Investigator Thomas that Defendant had given a statement; she responded that she did, but that the statement had not been recorded (194a). When asked if she mentioned in her report that Defendant had balled up the piece of paper and had thrown it in the trash, she responded that she did not (196a).

On examination by the court, the court asked Sgt. Hughes-Grubbs if she had the piece of paper that Defendant had balled up; she responded that she did (196a). The court then directed that the balled-up piece of paper be marked as an exhibit (196a). On continued examination by the

court, Sgt. Hughes-Grubbs was asked if she saw how the balled-up piece of paper got in the trash; she responded that she did, that she saw Defendant throw it in the trash (197a).

On recross examination, Sgt. Hughes-Grubbs was asked how she could have seen Defendant ball up the piece of paper and throw it in the trash if she was out of the room (198a). She responded that there was a camera in the room that Defendant was in and she watched him on a monitor outside of the room (198a).

Defense Witness

Edward Wardell

The only witness called by the defense was Edward Wardell. He testified that he was a school teacher, and that on March 19, 2002, he had been employed at the Detroit School of Industrial Arts (People's Appendix, 199a). He taught Algebra, Geometry, and basic math (200a). He taught fifth hour Algebra (200a).

He had records of attendance for his class (200a). His records showed that on March 19, 2002, Ebony was present in his class, but she was late for class (200a). That was the case with Shadonna Stubbs as well (201a). His records also showed that Ebony Wilson was present in his class on March 21, 2002; Shadonna was absent that day, however (201a). He did not recall giving Ebony Wilson permission to go to the RC on March 19 (202a). It was possible that she may have asked to go to the RC that day, but he would not normally give her permission to go there (202a).

On cross-examination, Mr. Wardell testified that he knew Defendant (205a). He was asked if he had ever seen Defendant and Ebony together; he responded that on one occasion, Defendant brought Ebony up to his classroom after an incident in the lunchroom (205a). He acknowledged that a student could report to his classroom and then leave to go to the RC and his records would not

necessarily reflect that (205a). He was asked about his attendance records for March 5, 2002 (205a). He testified that Ebony and Shadonna were absent from his classroom that date (206a).

Mr. Wardell testified that he was aware of Ebony Wilson being assigned to lunch duty for a period in March of 2002 (206a). She and Shaddona were assigned to lunch duty as punishment for some incident (207a). It was Defendant who notified him that Ebony and Shadonna would be on lunch duty for several days, and so, would be late for his class (207a).

Trial Court's Findings of Fact and Verdict

Following the arguments of the respective parties, the trial court rendered its findings of fact and verdict:

> THE COURT: The testimony of Ms. Wilson and Ms. Stubbs was replete with inconsistencies, and counsel for defense tries to list every single one of them. Most of them are not really even significant. You've got to remember, you're talking about fifteen-year-old girls in a school situation. But they don't have to explain everything.
>
> What the People have to do is convince me beyond a reasonable doubt that the offense and all of its elements occurred.
>
> And so what I have to do, because of the inconsistencies in Ms. Wilson and Ms. Stubbs' testimony, I have to see if Ms. Wilson is corroborated in any way, shape, form, or fashion by other things.
>
> The mistakes in the dates, as far as I'm concerned, are not significant. Kids don't keep that kind of stuff in their minds. Who cares whether it was the 21st or the 22nd? Kids don't care.
>
> But what I do have is what Ebony said occurred on a particular day is corroborated by what Ms. Stubbs says happened; and it's also corroborated by what the defendant admits happened.

There's other corroboration, and it does come through Ms. Diehl and the other individuals concerning this hallway and its appearance. It corroborates with what Ms. Wilson said.

The problem where is also that Ebony is a child attending a school where Mr. Nyx is, quote, dean of students, or dean of student discipline, and he does have authority over her. There is no reasonable explanation for how they get in this basement area. Even if she had tried to entice him there, he is the adult, the authority, the school authority who is in charge of student conduct.

So rather than, quote, succumb into this child's whiles, it was his responsibility to take that child back upstairs immediately, and report her conduct to her parents. So that's why I don't believe everything that he has said in his statement.

And also, I don't believe it because isn't it strange that Stubbs and Wilson both admit that Wilson goes to that door and pushes on it. And the defendant, Mr. Nyx, admits that he's there with this child. At least in his statement he says that. He's there with this child, and somebody pushes on the door, and he pushes back, and that ends the contact.

There was an – the defendant said that he touched her. Now, the complainant, Ebony, states that there was in fact digital penetration of her vagina, and penal penetration of her vagina.

I cannot quite believe that because, you see, common sense and everyday experience teaches me that sometimes kids exaggerate. And because of the inconsistencies in her testimony, I have to go with what I can rely upon. And what I can rely upon is what he told Officer Stubbs (sic). He told Officer Stubbs (sic) that he touched her.

Now, the admissions from Officer Stubbs' (sic) reports are not significant. I would like to see – except I know what the next question would be. I'd like to see all interrogations recorded. But there are some states – and there's a big problem right now in New York where they've got recorded statements from the kids who were convicted of the jogging incident, supposedly gang-raping a jogger in Central Park.

Well, now they claim that they only recorded their admissions. They didn't record the entire interview.

So even after we get the kind of equipment that's necessary, there's always going to be the question of, well, when did they start recording? Because there's always going to be – it's just like with a computer printout. It's dated a certain date. So when they turn on the tape, how will you know whether or not they had actually just begun the interview with the witness?

What we're still going to have to rely on is human beings, and we're going to have to judge their credibility. And Stubbs' (sic) credibility is reinforced by the fact that she actually comes back in here with that balled-up piece of paper.

And so I believe that the admissions that she says the defendant made, he did in fact make. And what they establish is that he intentionally touched the groin area or genital area of the complainant, and that this was done for sexual purposes. And that she, at the time of the alleged act, was between thirteen, fourteen, or fifteen years old at the time.

Fourth, that at the time of the alleged act, the defendant was in a position of authority over the complainant.

And I've got to tell you this. As I first stated to hear this case, I'm sitting here thinking there's no way that the People of the State of Michigan are going to be able to prove this, because there's no way in the world any teacher, any person who's been educated to be a teacher would allow themselves to get in such a situation where they would be in this particular area with a child, because they know it means their job. It's got to mean their job.

And then not only the complainant says it happened, her friend says it happened, and even the defendant admits that it happened.

He's guilty of criminal sexual conduct in the second-degree, and I so find.

(People's Appendix, 208a-212a).[1]

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[1] What should be noted is that at a postconviction proceeding, Defendant challenged the scoring of 25 points for Offense Variable 11:

MR. ROYAL : Thank you, your Honor.

The final issue regarding the guidelines is offense variable11. The Court scored 25 points for the occurrence of one act of criminal sexual penetration; this was in spite of the fact that

the Court found Mr. Nyx not guilty of all counts involving alleged penetration, and founded (sic) the allegations of the complainant of those points were not credible.

THE COURT: No, that's not really what I did. I'll tell you what I did, but go ahead.

MR. ROYAL: Well, that's –

THE COURT: Because I believe that the truth shall set you free. Go ahead.

MR. ROYAL: That's my interpretation of the Court's verdict.

But my position is that there was insufficient evidence to justify imposition of 25 points for that variable in light of the acquittal on those counts.

MR. CHAMBERS: There are case that say, your Honor, even when it's the trier of fact of – the Court is the trier of fact, that just because you find that a particular element hasn't been proven beyond a reasonable doubt, you can still find that it has been proven by a preponderance of the evidence for purposes of sentencing, and for scoring of the guidelines.

THE COURT: Okay, I'm going to tell you what I did. I

was trying to give the defendant a break. And very honestly, I feel bad for having to say this.

The People established the CSC-1. I was hoping that by compromising a verdict, this man wouldn't have to go to prison. They had established it. And I almost – I almost don't have to see the transcript. I can remember this case. I remember it because we're talking about a kid who was in school. And I hate to see this kind of thing happen to a kid who's in school, by somebody who is supposed to be an educator.

Yes, she had had – and she was a young girl, and she was giving her family a lot of trouble. I think it came out during the trial that there had been some discovery that she had been off grounds and had had sex with somebody else, maybe. And then this teacher uses that kind of information, and gets her in some kind of study hall or whatever else; and I believed every word she said.

But in trying to give him a break, I found him guilty of CSC-2 instead of the CSC-1. CSC-1, he must go to prison. I was surprised when I saw the Presentence Report and the guidelines in this case.

MR. CHAMBERS: Yes.

THE COURT: Now, as counsel says, I believe that it is correct, that they claim you can show it by a preponderance of the evidence, and that was weight (sic) [weighed] here. That's why I gave him 25 points.

You have now made your record for appeal if you need it, because they may tell me, well, Judge, you were wrong. You shouldn't have scored it.

Sentence

For his conviction of two counts of second-degree criminal sexual conduct, Defendant received concurrent sentences of three to fifteen years imprisonment, which was within the legislatively-enacted Sentencing Guidelines minimum range of 36 to 71 months.

> And I'm telling you, I did the best I could. I tried to give him a break. It will mean if the Court of Appeals tells me that next time you can't score those points, nobody is going to get that kind of break.
>
> Anything else?
>
> (People's Appendix, 216a-218a).

Argument

The "subset of the elements" test supplies the rule for determining when an offense is a degree of the charged offense where the Legislature has not itself formally divided the offense into degrees. The Legislature has created the offense of criminal sexual conduct, and has divided it into four degrees: first-degree criminal sexual conduct, second-degree criminal sexual conduct, third-degree criminal sexual conduct, and fourth-degree criminal sexual conduct. The trial judge, sitting as the trier of fact, could thus consider, and convict Defendant, charged with first-degree criminal sexual conduct, of second-degree criminal sexual conduct.

Pertinent Facts

Defendant, Maurice Lamont Nyx, was charged in an Information in the Third Judicial Circuit with three counts of first-degree criminal sexual conduct, pertaining to complainant Ebony Wilson, in violation of MCL 750.520b(1)(b)(iii). Specifically, the Information alleged that Defendant had engaged in sexual penetration with Ebony Wilson, who was 15 years old at the time, and so was a person at least 13 but less than 16 years of age, and that Defendant was in a position of authority over the complainant and used this authority to coerce the victim to submit. The Information alleged that three sexual penetrations had occurred, one being vaginal penetration and two being penetration with the finger or fingers.

In a waiver (bench) trial with the Honorable Vera Massey Jones sitting as the trier of fact, Judge Jones found Defendant guilty of two counts of second-degree criminal sexual conduct, finding that based on his own admission, Defendant had "intentionally touched the groin area or genital area of the complainant, and that this was done for sexual purposes."

The Court of Appeals Opinion

The Court of Appeals vacated both of Defendant's convictions of second-degree criminal sexual conduct and remanded the matter to the trial court for the entry of an order of acquittal as to the charged offenses of first-degree criminal sexual conduct on the basis that the trial court, contrary to MCL 768.32(1), had erred in finding Defendant guilty of offenses that were not inferior to the charged offenses. This was so, the Court of Appeals reasoned, because this Court, in *People v Cornell,*[2] had held that inferior offenses are only those that are necessarily included in the greater offense, meaning that all elements of the lesser offense are included in the greater, and, because second-degree criminal sexual conduct is a cognate lesser offense, meaning that it shares several of the same elements of the greater offense, but contains at least one element not found in the greater, the trial court did not have the authority, and certainly did not have the authority under MCL 768.32(1), to convict Defendant of an offense not charged in the Information. In so holding, the Court of Appeals rejected the prosecution's argument that this Court's holding of *Cornell* did not apply to crimes specifically divided into degrees by the Legislature, regardless of whether they would qualify as cognate offenses or not.

A

Criminal sexual conduct is an "offense consisting of different degrees," and second-degree criminal sexual conduct is a "degree of that offense inferior to" first-degree criminal sexual conduct.

i) The Task of Statutory Construction at Hand

Michigan's statement of the task of the judiciary in statutory construction is orthodox:

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[2] *People v Cornell,* 466 Mich 335; 646 NW2d 127 (2002).

- Our primary aim is to effect the intent of the Legislature.

- We first examine the language of the statute and if it is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of "legal art," are to be given their understood technical meaning.[3]

- *Only* where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent" and look to such aids as legislative history.[4]

This orthodox view, which has come to be known, sometimes derisively, as "textualism," has come under some attack, though in some of the expressed disagreement there appears to be more than a whiff of the semantic.

The principal disagreement between textualists and their critics is a fundamental one: when a court undertakes to "effect the intent of the legislature" what is it the court is attempting to

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[3] Helpfully, Michigan has statutes on the point: MCL 8.3a provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"; see also MCL 750.2 regarding construction of penal statute: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

[4] See e.g. *Wickens v Oakwood Healthcare Sys,* 465 Mich 53, 60; 631 NW2d 686 (2001); *People v Phillips,* 469 Mich 390; 666 NW2d 657 (2003); *Gilbert v Second Injury Fund,* 463 Mich 866; 616 NW2d 161 (2000); *People v Davis,* 468 Mich 77; 658 NW2d 800 (2003); *Dan De Farms, Inc v Sterling Farm Supply, Inc,* 465 Mich 872; 633 NW2d 824 (2001). This Court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v Guerra*, 469 Mich 966; 671 NW2d 535 (2003).

discover? Judge Easterbrook has written that "intent is empty."[5] By this he means not that the legislature is not the lawgiver, with the role of the court to discover what law it is the legislature has enacted, but that there is no collective *subjective* legislative intent: "Peer inside the heads of legislators and you find a hodgepodge . . . . Intent is elusive for a natural person, fictive for a collective body."[6] When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which naturally leads one first to the principal expression of intent – the text of the statute. The "law" is what the "objective indication of the words" of the statute, in their context, including that of the statutory scheme, mean. [7] And when necessary to the task – but only then – aids to construction may be employed, such as established canons of construction, and even legislative history, where it exists, and where it is helpful (and it often is not).

Textualism, then, is not "strict constructionism," "a degraded form of textualism that brings the whole philosophy into disrepute." [8] And Judge Easterbrook, a textualist, has remarked that ""[p]lain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'" it must be imputed . . . ."[9] But note the limitation of "interesting cases," which is to say that the meaning of a text, though often readily ascertainable from the meaning of the words

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[5] Frank Easterbrook, "Text History, and Structure in Statutory Interpretation," 17 Harv Jrnl L & Pub Policy 62, 68 (1994).

[6] *Id.*

[7] Antonin Scalia, *A Matter of Interpretation*, at 29.

[8] *Id*, at 23.

[9] Easterbrook, at 67.

understood in their ordinary sense, on occasion is ambiguous or, given the statutory scheme in which the text is placed, unclear. So long as the court in its attempt to discover the "objectified" intent of the legislature does so by seeking to determine "what a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*,"[10] its opportunity for supplanting the law as enacted with law of its own choosing is limited.

Returning, then, to the principles of statutory construction as oft-stated by this Court, they may be rephrased as follows:

- Our primary aim is to effect the intent of the Legislature as that intent was objectified by the legislature in a written text.

- We first examine the language of the statute and if a reasonable person would gather a particular meaning from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, we enforce that understanding; if the statute employs technical words and phrases, or words that may have acquired a peculiar and appropriate meaning in the law, those shall be construed and understood according to that meaning.

- Where a reasonable person could gather multiple meanings from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, then other objective indicators of understanding are employed to the extent they are helpful, such as legislative history.

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[10] Scalia, at 17. And see Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 427, 538 (1947) (quoting Justice Holmes as saying, with regard to legislative intent, "I don't care what their intention was. I only want to know what the words mean").

ii) Application to MCL 768.32

This is a case where an examination of the language of the statutory text, as its terms commonly would be understood, reveals a meaning that is clear and unambiguous. As Justice Holmes once said, the judicial function in this circumstance "is merely academic to begin with, to read English intelligently . . . ."[11]

MCL 768.32(1) provides that:

> . . . . upon an indictment/(information) for *an offense, consisting of different degrees*, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of *that* offense *inferior to that charged* in the indictment/(information), or of an attempt to commit that offense[12]

a) The Text

In examining the application of the statute to the crime of criminal sexual conduct (and other such offenses that are divided into degrees; see, for example, home invasion) the text is clear and unambiguous. If 1) an offense is charged, and 2) the offense consists of different degrees, and 3) another offense is a "degree of *that* offense, which is 4) inferior to the offense charged, then 5) it

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[11] *Northern Securities Co v United States*, 193 US 197, 400- 401; 24 S Ct 436, 468; 48 L Ed 679 (1904) (Holmes, J.). See also *Hoste v Shanty Creek Management, Inc,* 459 Mich 561, 574; 592 NW2d 360 (1999); *Western Michigan University Bd of Control v Michigan,* 455 Mich 531, 539; 565 NW2d 828 (1997).

[12] The statute is not only venerable, dating back almost a century and a half, but common in this country. See e.g. West's Annotated Mississippi Code § 99-19-5 (and its predecessor, § 22 Hutchinson's Code of 1848, which more closely tracked MCL 768.32); Rev Stat of NY, part IV, ch I, tit VII, § 27 (1829); § 556.220, R S Mo 1969 (Missouri); § 41–13–1, NMSA1953 (2d Repl Vol 6) (New Mexico); § 14, p. 513, 1 Wagner's Statutes (Nevada).

is not inappropriate by being contrary to law for an instruction to be given on that offense or for a trial court, sitting without a jury, to consider it. It is not difficult to discern whether criminal sexual conduct is an offense that "consists of different degrees," for the Legislature has formally divided the offense of criminal sexual conduct into four different degrees and enumerated them as "degrees." The highest or most severe degree of criminal sexual conduct is first-degree criminal sexual conduct, and the degrees following are inferior to criminal sexual conduct in the first-degree, and each following degree is inferior to the one which precedes it. On an examination of the text, the statute unambiguously provides that consideration of inferior or lesser degrees of a "degreed" offense is allowed. The inquiry may end here. But going on to context and history, is there anything in either the context of the statute in the statutory scheme, or its history, that would demonstrate that it does not mean what it so clearly says?

b) Context and History

Construing the statute in 1869, Justice Christiancy for the Court observed that "[t]he general rule at common law was, that when an indictment charged an offense which included within it another less offense *or* one of a *lower degree*, the defendant, though acquitted of the higher offense, might be convicted of the less,[13] subject to a discarded limitation on lesser offenses that were misdemeanors. The use of the disjunctive in the common-law rule is suggestive; that is, Justice Christiancy referred to offenses "included within" the charged offense *or* offenses "of a lower degree" than the charged offense, suggesting that the two are not necessarily identical. This Court in *Hanna* was not concerned with offenses formally divided into degrees, but was required to determine whether the statute was limited to these offenses, and determined not:

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[13] *Hanna v People*, 19 Mich 316, 318 (1869) (emphasis supplied).

> I do not think this provision was intended to be restricted in its application to offenses divided by the statutes contained in this title (which included all the provisions in reference to crimes), into classes *expressly designated* by the name of "degrees."[14]

The Court reached this conclusion in that if the statute were to be *confined* to offenses expressly or formally divided into degrees, then its application would have been limited to the offense of murder, as it was the only offense then divided into degrees by the Legislature.[15] So confined, the statute, in the context of both history and the statutory scheme, would have been entirely superfluous. This was so because the common law already provided for consideration of second-degree murder in an appropriate case;[16] moreover, as to murder, consideration of second-degree murder was *covered by a separate statute*. If it was not plain from the text of the statute and history, said Justice Christiancy, that the statute covered more than only murder, then the Legislature had "put this view in the clearest possible light; by expressly providing in the next section (*Sec 3 Ch 153, Rev Stat of* 1846), after dividing murder into degrees, for a conviction of murder in the second degree upon a charge of murder in the first . . . ."[17] The Court's reference to "*Sec 3 Ch 153, Rev Stat of* 1846" is a reference to what is today MCL 750.318, providing, in pertinent part, that "[t]he jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree." Thus, continued the Court, if

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[14] 19 Mich at 320 (emphasis supplied).

[15] 19 Mich at 320.

[16] 19 Mich at 320.

[17] 19 Mich at 320-321.

MCL 750.32[18] "is not to be applied to any offenses not divided into degrees *eo nomine*, then it can have no application or effect whatever, and must have been inserted in the statute for no purpose or object. Such a construction is inadmissible, if the provision will admit of any other."[19]

The whole point of *Hanna*, then, is that the statute is not *limited* to statutes formally or expressly divided into degrees. It certainly *includes* murder, then the only offense divided into degrees, but is not "restricted" to it. The history of the section, and its context "placed alongside the remainder of the *corpus juris*,"[20] demonstrates, then, that it applies *both* to offenses formally

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[18] Then Comp L Sec 5.952 of the Revised Statutes of 1846.

[19] 19 Mich at 321.

[20] Scalia, supra.

divided into degrees,[21] *and* to those offenses that are included within the charged offense by being a "part" of it in the sense of consisting of a subset of its elements.[22]

This Court should now, the People submit, recognize that *Cornell* is a tool of construction for those many situations where the Legislature has not *expressly* or *formally* divided an offense into degrees; where it *has*, no construction is necessary. When the Legislature *has* formally divided an offense into degrees, as it now has with criminal sexual conduct, home invasion, and the like, then by legislative definition, the offense is one "consisting of different degrees" and the *Cornell* test is unnecessary. For an offense such as criminal sexual

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[21] *Hanna*'s operating assumption – that the statute *applied* to murder, the only offense then divided into degrees by the Legislature, the question being whether it was *restricted* only to murder – demonstrates that the "subset" analysis is unnecessary to the identification of included offenses which are expressly made "inferior degrees" by the Legislature, not only because of the unambiguous text ("an offense consisting of different degrees"), but history. At that time, it must be remembered, second-degree murder contained an element *not* required for first-degree murder when the theory of murder was that it was committed during the course of an enumerated crime. At the time, a showing of malice was *not* necessary to first-degree murder on this theory – it was not until *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980) amended the statute by striking one definition of murder at the common law (a death during the course of any felony; the common-law definition(s) of murder having been enacted by the legislature by use of the term without alteration, cf. *People v Riddle*, 467 Mich 116; 330 NW2d 647 (2002)) that proof of malice became necessary for conviction of first-degree "felony" murder. Thus, at the time, when the theory of first-degree murder charged was "felony-murder,"second-degree murder was considered within this statute though it contained an element *not* present in the first-degree murder charged. See also *State v Wilkerson*, 616 SW2d 829, 832-833 (Mo, 1981), finding second-degree murder an "inferior degree" of first-degree murder, including "felony murder," under a statute identical to MCL 768.32, on the ground that the legislature had "specifically denominated" it so. But see *State v Wade*, 200 W Va 637, 645-646; 490 SE2d 724, 732-733 (1997), finding second-degree murder not a lesser-included offense of felony-murder because not a subset of its elements where malice not required for felony-murder, *but* with no statutory counterpart to MCL 768.32 concerning offenses consisting of different degrees and "inferior" degrees.

[22] This the holding of *Cornell*, to which the People fully subscribe, and will not reargue here.

conduct, and it is formally divided into degrees by the Legislature, which has expressly denominated the degrees of the offense in descending order (1st, 2nd, 3rd, and 4th), with the *Cornell* test applicable to other situations where offenses may be subsets of these offenses though not formally denominated as lesser degrees.[23] Thus, CSC 2 is an included offense of CSC 1 without regard to whether it meets the subset of elements test, because the Legislature has formally divided the offense of criminal sexual conduct into degrees.

c) Conclusion

Criminal sexual conduct is an offense divided into degrees. Second-, third-, and fourth-degree criminal sexual conduct are "inferior" to criminal first-degree criminal sexual conduct. Thus, a trial court, sitting as the trier of fact, does no violence to MCL 768.32(1) in considering, and convicting a defendant, charged with first-degree criminal sexual conduct, of second-degree criminal sexual conduct, provided that an element of the charged offense of first-degree criminal sexual conduct not present in the lesser offense of second-degree criminal sexual conduct, that being the element of penetration, was in dispute, and a rational view of the evidence supported it.[24] An offense is clearly supported where there is substantial evidence to support a conviction of the lesser offense.[25]

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[23] See e.g. *People v Nickens*, 470 Mich 622; 685 NW2d 657 (2004).

[24] *Cornell, supra*, 466 Mich at 357.

[25] *People v Silver,* 466 Mich 386, 388, fn 2; 646 NW2d 150 (2002).

B

An element of the charged offense of first-degree criminal sexual conduct not present in the lesser offense of second-degree criminal sexual conduct, that being the element of penetration, was in dispute, and a rational view of the evidence supported the trial court's consideration of second-degree criminal sexual conduct.

Although the Court of Appeals never reached the issue of whether the element of penetration was in dispute and whether the evidence clearly supported the trial court's consideration of second-degree criminal sexual conduct as a possible verdict, the People will address those questions here.[26]

i) The element of penetration was in dispute.

On cross-examination of the complainant, Ebony Wilson, defense counsel brought out the disparity in the respective heights of the complainant, who was 5'4" or 5'5"(People's Appendix, 77a-78a), and Defendant, who was 5'11" or 6' tall (86a), insinuating that the disparity in the heights made it unlikely that Defendant had actually penetrated the complainant's vagina with his penis. Indeed, defense counsel asked the complainant if it was her testimony that Defendant inserted his penis while they were both in a standing position; she responded that it was (78a). Defense counsel also brought out the fact, on cross, that the complainant, at the Preliminary Examination, had been asked if Defendant had had an erection and that her answer had been that he had not (77a). As far as the digital penetration, the complainant testified, on the prosecutor's direct examination, that Defendant

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[26] In *Cornell*, this Court stated that "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." 466 Mich at 357. The People would surmise that this principle would apply as well to offenses that are *expressly* divided into degrees by the Legislature, and not just to *necessarily* lesser included offenses. Furthermore, it would apply to bench trials. *Cornell,* 466 Mich at 349, fn 5 (MCL 768.32(1) applies in both bench and jury trials).

rubbed his fingers in between her legs (56a). When asked where his fingers went, she responded that they were on the *side* of her vagina; she then said that his fingers went *inside* of her vagina (56a). Finally, and most importantly, Defendant, in his statement to Sergeant Hughes-Grubbs, indicated that he merely touched the complainant's vagina.

ii) A rational view of the evidence supported the trial court's consideration of second-degree criminal sexual conduct.

When reviewing this component, the reviewing court is to survey the entire cause.[27] At the time of Defendant's trial, MCL 750.520c, of which Defendant was convicted, provided, in pertinent part as follows:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> * * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> * * * *
>
> (iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.[28]

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[27] *Cornell, supra*, 466 Mich at 366.

[28] PA 2002, No. 714, which became effective April 1, 2003, added this provision to MCL 750.520c:

> (iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.

MCL 750.520a defines "sexual contact," for purposes of MCL 750.520c, as follows:

> n) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor' s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose,

As noted previously, Defendant's statement admitted sexual contact, but not penetration. And clearly, the only reasonable explanation for the touching was, according to Defendant's statement, for the purpose of sexual arousal or gratification. Thus, there was substantial evidence supporting the trial court's consideration of second-degree criminal sexual conduct. And the fact that Defendant's statement was introduced by the prosecution should not make a difference.[29] Nor

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[29] See e.g. *People v Johnson,* unpublished opinion per curiam of the Court of Appeals, decided October 14, 2004 (Docket No. 246937), p 4 (a copy of this Opinion is in the People's Appendix, 11a-15a); see also *Hogan v Gibson,* 197 F3d 1297, 1308-1311 (CA 10, 1997) (evidence presented in capital murder trial warranted instruction on lesser-included offense of first-degree manslaughter under Oklahoma law, and, thus, defendant's due process rights were violated by trial court's refusal to instruct jury on first-degree manslaughter, where defendant's confession, along with other testimony introduced at trial and medical evidence of knife wounds to defendant's hands, could lead reasonable jury to find adequate provocation in context of attack by victim, heat of passion resulting from fear and terror, causation, and immediacy; fact that a confession may be to some degree self-serving does not deprive a jury of its prerogative to consider that fact in evaluating the credibility of a claim of provocation and passion, within meaning of Oklahoma's first-degree manslaughter statute); *State v Barnard,* 972 SW2d 462, 466 (Mo App WD, 1998) (defendant was entitled to instruction on second degree child molestation as lesser included offense of statutory sodomy; based on defendant's denial in a taped statement that he penetrated victim's vagina, jury could have acquitted him of statutory sodomy and convicted him of child molestation); *State v Boucher,* 13 Or App 339, 344; 509 P2d 1228, 1231 (1973) (where evidence, in prosecution for first-degree robbery, showed that crime of theft had been committed, fact that only evidence of lesser included offense of theft by receiving was contained in defendant's confession did not justify court's refusal to give requested instruction on lesser included offense of theft by receiving).

does the fact that neither party requested the court to consider second-degree criminal sexual conduct as a lesser offense make any difference.[30]

iii) Conclusion

A rational view of the evidence supported a finding, based primarily on Defendant's statement, that touchings, as opposed to sexual penetrations, had occurred, and that the purpose of the touchings had been for sexual arousal or gratification. Thus, the trial court properly considered second-degree criminal sexual conduct as a lesser offense. And, while the court's verdict had all the markings of a "waiver break" (indeed, the trial court, at a postconviction proceeding, admitted that it gave Defendant a break by convicting him of second-degree criminal sexual conduct, as opposed to first-degree criminal sexual conduct, a verdict which the evidence would have supported), this should not inure to Defendant's benefit.[31] [32]

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[30] *People v Darden,* 230 Mich App 597, 599; 585 NW2d 27 (1998).

[31] *People v Ellis,* 468 Mich 25; 658 NW2d 142 (2003).

[32] This is really not a "waiver break," as this Court defined the term in *Ellis*, because the trial court did not, *at the time of the time of its verdict*, make a finding that all of the elements of first-degree criminal sexual conduct, particularly the element of penetration, had been committed. In other words, a "waiver break" occurs, according to *Ellis*, when a trial court, sitting as a finder of fact, acquits a defendant of a charge when its findings of fact clearly show the defendant's guilt.

Relief

Wherefore, the People respectfully request that this Honorable Court reverse the Opinion of the Court of Appeals which vacated Defendant's convictions and sentence for two counts of second-degree criminal sexual conduct.

Respectfully submitted,

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